

Gorgievska (Migration) [2018] AATA 5310 (26 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Lila Gorgievska
VISA APPLICANT:	Mr Zoran Talevski
CASE NUMBER:	1711127
DIBP REFERENCE(S):	OSF2016029242
MEMBER:	Meena Sripathy
DATE:	26 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.213 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations • cl.309.222 of Schedule 2 to the Regulations.

Statement made on 26 October 2018 at 4:13pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – sponsorship limitation – previously sponsored two partners – compelling circumstances – past relationship history – continuance and genuineness of current relationship – degree of hardship – supporting role for daughter and grandchildren in Australia – grandson’s significant disability – credible witnesses – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), r 1.20J; Schedule 2, cls 309.211, 309.213, 309.221, 309.222

CASES

Babicci v MIMIA [2004] FCA 1645

Babicci v MIMIA [2005] FCAFC 77

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 April 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 19 December 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.222 because the delegate found that the sponsorship cannot be approved on the basis of r.1.20J, as the sponsor has previously sponsored two partners who were granted Partner visas and the delegate was not satisfied there were compelling reasons affecting the sponsor.
5. The review applicant appeared before the Tribunal on 26 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Marija Macri, the review applicant's daughter.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The visa applicant is a 33 year old man from the Republic of Macedonia. He indicates no previous marriage or de facto relationships. He has parents and one sister in Macedonia. He is sponsored by the review applicant, who is a 47 year old dual Macedonian/Australian citizen. At the time of the application she had a father and brother who reside in Macedonia and a daughter residing in Australia. She was previously married twice before. The parties met in person in August 2015 in Macedonia and married there on 8 August 2016.
8. Evidence of the sponsor's previous marriages and divorces, visa applicant's identity, sponsor's employment, statements of the history of the relationship by the parties and supporting Statutory Declarations from third parties were provided in support of the application. The sponsor also provided a submission addressing the r.120J sponsorship limitation issue, setting out her background and past relationships. She explained she was born in Australia in 1971 and in 1980 her parents returned to Macedonia to live. While there, at age 14, her mother died of cancer and she went to live with her father and his new wife with whom she didn't get along. She got involved in a relationship and married and one year later gave birth to her daughter. Her husband had gambling and drinking problems and was abusive and eventually they divorced. After this, while on holidays in Macedonia she met her second husband and married in 2000. After he came to Australia in 2002, he eventually lost interest in her and left her and they divorced in 2005. In 2009 her daughter got married and had 3 children, including one child who was born with cerebral palsy. She busied herself helping and supporting her daughter and her family. In 2013 she met the visa applicant, initially by chatting over the internet and then in person in 2015. They fell in love and married in 2016 and lodged this application. The sponsor explains that she wants to be with

the visa applicant but feels torn by her daughter's need for her practical and emotional support in Australia.

9. The delegate refused the application because he was not satisfied that the visa applicant and sponsor's relationship was longstanding or that any of the other circumstances set out in the relevant departmental policy guidelines apply and was not satisfied there were compelling reasons affecting the sponsor.
10. Before the Tribunal the review applicant has submitted a substantial amount of further evidence to support the existence of an ongoing and genuine relationship with the visa applicant including support statements from friends and close family members, evidence of regular communication between the parties and evidence of a further visit by her to Macedonia in 2017. She also submitted a report by Dr Blagoje Kuljic, Consultant Psychiatrist, who states that he has been seeing her since June 2017 when she was diagnosed with adjustment disorder with anxiety and depressed mood in the context of family issues. He describes her symptoms and treatment provided. The report refers also to a further stressor in her life when her only brother was killed in a car accident in December 2017 which led to a worsening of her symptoms. Dr Kuljic states his opinion that refusal of the visa would lead to the review applicant losing a significant person who can help her cope with her recent loss of her only brother and long lasting family situation supporting her daughter who also suffers depression and grandson with cerebral palsy. Her existing anxiety and depressive symptoms are likely to worsen with an adverse result on this application.
11. At the hearing the review applicant gave evidence about her current circumstances, family background and relationships, and the inception and development of the relationship with the visa applicant. The Tribunal also discussed with her the impact on her of refusal of the application. She gave her evidence openly and candidly and the Tribunal found her to be a sincere and credible witness and accepts her evidence on that basis. It was also similarly impressed with the genuineness and credibility of the witness, her daughter and also accepts her evidence on that basis. A summary of relevant evidence obtained at the hearing follows.
12. The review applicant told the Tribunal she lives in Liverpool by herself in rented accommodation. She has been living at this address for 6-7 years. Prior to that she lived with her daughter and her family for several years, and moved out because of the expansion of her daughter's family after the birth of her first child. She works at Sydney Airport as a security screening officer and has been employed in this position for 14 years.
13. The review applicant's family in Australia comprises her daughter, who is married and has three children, aged eight, five and a half and four and a half years. The second child was born with cerebral palsy and requires significant care. Her daughter's husband works full time, in several different jobs and they live in a granny flat on a property with his parents. The review applicant's father lives in Macedonia, as did her only brother, who died in a car accident in Macedonia last Christmas. The review applicant's mother died when she was 14 years old.
14. She described the circumstances that led to her first marriage. After her mother died she went to live with her father and his new wife and they did not get along. She married at 15 years of age and had her daughter a year later. She returned to Australia in 1994 and at this time sponsored her first husband for a Partner visa. He came in 1995 and they continued in a relationship until around 1999. The relationship ended due to drinking and abuse on his part. In around 2002, she returned to Macedonia for a holiday and during this time she met and married her second husband. She sponsored him for a visa and he came to Australia on this basis. They were in a relationship for a few years but he lost interest in her and left

her for another woman. In around 2009 the review applicant moved in with her daughter, who had by then married, and helped her when she had her first child.

15. The review applicant provided the following account of the present relationship. In 2013, her daughter gave birth to her second child. He was born with cerebral palsy. It was a stressful period and she gave her daughter significant support. On the encouragement of her daughter she went on a holiday to Macedonia. Sometime after she returned she received a friend request via Facebook from the visa applicant who indicated he had seen her when she was visiting. They eventually started chatting and the relationship developed from there. The review applicant's daughter gave a consistent account of how the relationship started and developed. The review applicant returned to Macedonia in 2015 when she met the visa applicant in person. When asked why the delay in visiting again, she explained that her daughter had another child in this period and needed her support. The visa applicant also attempted to visit her in Australia (as a surprise) but was refused a visitor visa. During this visit in 2015 he surprised her with an engagement ring. She returned to Macedonia in 2016 and they married. Her daughter and eldest grandson attended the wedding, together with other close relatives including her aunty and uncle. Her father and brother did not attend the wedding due to issues she was having with them at the time, and the visa applicant's parents and sister also did not attend as they do not approve of the relationship.
16. Since then the review and visa applicants talk regularly over the internet. She visited again in September 2017. She has not been able to go more regularly due to limited holidays, financial constraints and family commitments. The visa applicant is now working in Germany in a plastics factory since January. They have discussed future plans together which involves living together in Australia and continuing to support and help the review applicant's daughter and her family. He has met her daughter and eldest son, and the review applicant's aunty and uncle. He also more recently met the review applicant's father and, before his sudden death, her brother and his family. The visa applicant attended the funeral of the review applicant's brother and has since then maintained contact with and visits, her brother's widow and two children, and father who lives with them. The review applicant's daughter gave consistent evidence of the visa applicant's involvement with her family. The daughter is very supportive of the relationship and gets on well with the visa applicant. She told the Tribunal that she is confident that he loves the review applicant and has indicated he wants to support her and her family with the review applicant. She wants her mother to be happy given the hardship she has experienced in her life and believes the visa applicant is good for her.
17. The Tribunal asked the review applicant why she believes that the relationship with the visa applicant will last given her past history. She said she believes he is very different and if he wasn't prepared to stick around he would have left her by now. Her friends in Macedonia maintain contact with him and they are supportive of the relationship. The Tribunal discussed the matter of the age difference between them with both the review applicant and her daughter, and they both gave evidence that this has never been an issue for any of them.
18. The Tribunal asked about the role she plays with her daughter and grandchildren. She helps her daughter to look after Mark, who suffers from cerebral palsy, by looking after the other two children so her daughter can take Mark to appointments. She goes there to help her at least every second or third day, and most of her days off work. She talks to her daughter daily, and gives her emotional support. The review applicant was familiar with the children's routines. She provides financial support by buying clothes and toys for the children. Her daughter lives with her in laws and they also provide support but as her mother she is particularly close to her daughter and they give each other emotional support. The review applicant told the Tribunal she started to see a psychiatrist last year after the refusal decision.

because she began to experience anxiety and panic attacks. She is on medication now and sees the psychiatrist every 2 months. She had a past history of depression also.

19. The review applicant's daughter told the Tribunal that her mother would be devastated if the visa is refused. She would be torn between her, her grandchildren and her husband and it would be very hard for her. She has a history of depression and the daughter said she believes it would ruin her. The daughter stated that she speaks to her mother daily and her mother helps her significantly with the children, coming over most days when she is not working, or after work when she can. They are very close and she needs her for emotional support, especially because of the burden of caring for her severely disabled son. She stressed to the Tribunal that she very much needs her mum but also wants her to be happy and have this relationship. Her children are also very close to their grandmother and it would be hard on them and the review applicant if she had to leave.
20. The Tribunal attempted to take evidence from the visa applicant at the hearing, but due to difficulties with the interpreter, the call was abandoned.

21. FINDINGS AND REASONS

22. The delegate refused the application on the basis of failure to satisfy cl.309.222 and did not make specific findings regarding the issue of the relationship between the applicant and sponsor. The Tribunal has reconsidered this issue on the material now before it, and for reasons more fully explained below, has reached a different conclusion on the approval of the sponsorship on the basis that it is satisfied there are compelling circumstances affecting the sponsor for the purposes of r.1.20J(2).
23. On the available evidence that arises on the material before it, the Tribunal has also made favourable findings about the existence of a genuine and continuing relationship between the visa and review applicants at time of application and decision and remits the application to consider the remaining criteria for the visa.

Are the sponsorship requirements met?

24. The primary issue in the present case, on which the application was refused, is whether the sponsorship requirements are met, and in particular whether approval of the sponsorship is precluded by r.1.20J or there are compelling reasons affecting the sponsor to allow the sponsorship to be approved.
25. Clause 309.213 requires that the visa applicant is sponsored by the review applicant, where such person has turned 18; or where they have not, by the review applicant's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations). At the time of decision, this sponsorship must have been approved and still be in force: cl.309.222.
26. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations. Regulation 1.20J of the Regulations sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship. Under r.1.20J, a sponsor is limited to a total, in a lifetime, of two approved sponsorships or nominations that lead to a grant of a partner visa (or entry permit) or a visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of *being* sponsored, a period of 5 years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: r.1.20J(2).

27. The Tribunal accepts that the review applicant sponsored the visa applicant at time of application and the relevant age and residence requirements are met, as the review applicant is over 18 years of age and an Australian citizen.
28. On the basis of information provided in the application and by the review applicant to the Department and Tribunal, it finds that the sponsor, ie. review applicant, has been married two times previously and has sponsored both of these husbands for Partner visas, which were granted. She gave evidence to the Tribunal about each of these marriages as detailed above. Departmental records confirm that the review applicant sponsored these individuals and that they were granted partner visas on the basis of those sponsorships. On this evidence, the Tribunal finds that r.1.20J applies, unless it is satisfied that there are compelling circumstances affecting the sponsor.

29. *Compelling reasons*

30. The expression 'compelling circumstances' is not defined in the legislation. The Tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerfully irresistible way: *Babici v MIMIA* [2004] FCA 1645 or are 'so powerful that they lead the [Tribunal] to make a positive finding that the [provision] should be waived': *Babici v MIMIA* [2005] FCAFC 77.
31. Having regard to all of the material now before it, including the evidence provided prior to and at the hearing relating to the review applicant's background, circumstances of past relationships, and current circumstances and impact of a refusal of the application on the review applicant, the Tribunal is satisfied that there are compelling reasons affecting the sponsor which justify the limitation on sponsorship in this case not to apply. In reaching this conclusion, the Tribunal has taken into account the following matters.
32. The sponsor's first two sponsorships took place over 20 and 15 years ago respectively. The first relationship lasted over 10 years and there was a child of the relationship. While the second relationship was not of such a long duration and did not produce any children, there is no information before the Tribunal to suggest it was not genuine at the time it was entered into. The Tribunal considers, on the evidence before it, that there is also nothing to suggest that the present relationship commenced some 10 years after the end of the last one, is not genuine, and as indicted below it makes favourable findings below on this issue. Therefore, the Tribunal finds, given the particular circumstances of the review applicant's past relationship history, imposition of the sponsorship limitation in her case is unfair and unjust.
33. The Tribunal takes into consideration the review applicant's close relationship to, and support of, her only daughter and her grandchildren. The review applicant has only one daughter, with whom she has always had a very close relationship. She has been integral to her daughter's life even after she married and had children, and the Tribunal accepts that the review applicant and her daughter and grandchildren would all suffer hardship if the application was refused forcing the review applicant to choose between her husband and her daughter and grandchildren. Her daughter's son's significant disability adds to the compassionate and compelling considerations in this case, as the Tribunal accepts the review applicant has played a significant and essential support role for her daughter to enable her to care for her son.
34. The Tribunal has also considered the report of Dr Kuljic and accepts that the prospects of visa refusal has caused the review applicant's mental health to suffer and she is receiving medication and treatment as a result. It accepts on the basis of the report and opinion of her treating psychiatrist, and her own evidence, that she has a history of depression and that being forced to choose between her relationship and commitments to her daughter and grandchildren would cause her to suffer psychologically.

35. The Tribunal accepts that the review applicant has significant ties in Australia to her daughter and grandchildren. It also accepts she is gainfully employed in a long term job, which she enjoys and it would cause her unjust financial hardship and detriment if she had to leave her employment to live overseas with her husband. It also accepts that she would face financial stress if she had to travel back and forth to maintain her relationships and commitments to her husband overseas and daughter in Australia.
36. All of above reasons, considered cumulatively, lead the Tribunal, powerfully and irresistibly, to conclude that there are compelling reasons affecting the sponsor such that the limitation on sponsorship should not apply in this case. Therefore, the sponsorship can be approved.
37. On the evidence before the Tribunal the requirements of cl.309.213 and cl.309.222 are met.

38. Genuine relationship

39. Given the substantial quantity of evidence relating to the existence and continuation of the spousal relationship provided to the Tribunal, and the evidence obtained at the hearing on this issue the Tribunal is satisfied that there is sufficient material before it to make findings on this matter also.
40. It is noted that the visa applicant was available and willing to give oral evidence at the hearing and was only unable to due to interpreter difficulties. The Tribunal ultimately considered it unnecessary to call him again, as it was sufficiently satisfied in a favourable way on the testimony of the review applicant and her daughter, as detailed above.
41. Therefore, having regard to the evidence of statements and statutory declarations from the applicant and sponsor; numerous supporting statements from the sponsor's family and close friends, contemporaneous social media and email communications over several years of the relationship, and a substantial quantity of photos, and the consistent, detailed and compelling oral evidence of the review applicant and her daughter, the Tribunal is satisfied that, at time of application, and continuing at time of decision, the relationship between the visa applicant and review applicant was and is genuine and continuing, that they had, and continue to have a mutual commitment to a shared life to the exclusion of all others and they are not living separately and apart on a permanent basis. The Tribunal therefore finds that the requirements of cl.309.211 and cl. 309.221 are met at time of application and time of decision respectively.
42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

43. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations;
 - cl.309.213 of Schedule 2 to the Regulations;
 - cl.309.221 of Schedule 2 to the Regulations; and
 - cl.309.222 of Schedule 2 to the Regulations.

Meena Sripathy
Member